Supreme Court of the United States

OCTOBER TERM, 1954

No. 96

COMPAGNIE NATIONALE AIR FRANCE,

Petitioner,

against

EDITH KOMLOS, as Administratrix of the Goods, Chattels and Credits of EMERY KOMLOS, Deceased,

Plaintiff-Respondent.

PETITIONER'S REPLY BRIEF

1. Respondent Estate contends that the recent stipulation for consolidation between it and Royal entered into after the decision of the Court of Appeals renders the issues on this application moot.

The stipulation is not valid. The Court of Appeals has held that Royal may not sue. The Court concluded:

> "* * * we hold that the entire cause of action remains in the hands of Komlos estate for the benefit of the mother."

While that decision stands, Royal cannot maintain its action. The making of a motion by the petitioner to dismiss Royal's separate action is being held in abeyance pending the final outcome in this proceeding. As the litigation now stands, the motion to dismiss Royal need only be

made to be granted. It is obvious that Royal, having no right to maintain an action, cannot consolidate its "action" with another.

After the Court of Appeals rendered its decisions Royal, realizing its anomalous position, moved before that Court to recall and amend the mandate to provide that Royal would not be dismissed until the key question of Portuguese law, described below, is decided. The stipulation for consolidation between Royal and the Estate was presented to the Court on that motion. The Court of Appeals denied the motion without opinion.

Even if the stipulation were valid and an order could be entered thereon, the issues herein would not be moot. The Court of Appeals first found that there was a right to moral damages in aviation accidents under Portuguese law. Then, in denying the rehearing, the Court, without making any other change, decided that the question of whether or not moral damages is allowable under Portuguese law is to be decided by the trial court after further proof. On this proof the interests of the Estate and Royal are, and will be, diametrically opposed. Thus, the vital questions as to ownership of the claim still remain and they are of great importance to the general administration of Workmen's Compensation laws and to aviation claims.

2. Respondent Estate contends that the decision of the Court of Appeals is not a final determination in the sense that a trial on the merits is still to be had. The decision is final in holding that Section 29(2) of the Workmen's Compensation Law did not assign the whole of the single indivisible cause of action. The decision will not be changed by a trial on the merits. The possibility of the questions now raised being brought up on a future appeal in this case is negligible. After a trial of the issues, there will be either (a) no appeal, or (b) an appeal on other issues.

3. Respondent Estate alleges that petitioner has prevented the case from proceeding on the merits for about four years (Resp. Brief, p. 10). This is not the fact. Even if true, it is immaterial.

The petition for a writ of certiorari was filed on May 26, 1954, forty-three months after the original complaint was served on October 26, 1950 (the date of the accident was October 28, 1949). The Estate is responsible for about twenty-two of the said forty-three months, as follows:

Serving an amended complaint on January 30, 1951 (about three months' delay); requesting a one-month adjournment of a motion attacking the amended complaint before answer and not entering an order on the reargument of that motion promptly (about three months' delay); failing to promptly submit reply affidavits on Portuguese law in the summary judgment motion here involved (about two months' delay); and securing extensions of time within which to perfect its appeal by orders and stipulations to August 1, 1953, thus preventing a hearing of the appeal before October or November 1954 (about fourteen months' delay).

Considerable time was used up by the normal course of litigation involving motions and appeals, as follows:

Extensions of time to answer the amended complaint by stipulation (about four months); time on notices of motion and entry of orders (about one month); time by the Court to decide the summary judgment motion (December 18, 1951 to July 14, 1952—about seven months); adjournment of the argument of the appeal from the October Term to the November Term in 1953 (about one month); time from the argument of the appeal to the decision on the petition for rehearing (November 13, 1953 to February 26, 1954—about three and one-half months); and time to prepare and file the petition for a writ of certiorari (three months).

WHEREFORE, the petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANK J. FOLEY,
Counsel for Petitioner,
80 Broad Street,
New York 4, N. Y.

MILTON JAMES,
of Counsel.